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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 572 10

SCHINE CHAIN THEATRES, INC., *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION SUBMITTED WITH PETITION FOR REHEARING

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 572

SCHINE CHAIN THEATRES, INC., *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA

STATEMENT AS TO JURISDICTION SUBMITTED WITH PETITION FOR REHEARING

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants Schine Chain Theatres, Inc., Schine Circuit, Inc., Schine Theatrical Co., Inc., Schine Enterprises Corporation, Schine-Lexington Corporation, Chesapeake Theatres Corporation, J. Myer Schine, Louis W. Schine, and John A. May, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on July 5, 1946. A petition for appeal was filed in the District Court on August 26, 1946, and was allowed by order of the same date.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, 15 U. S. C. § 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Crescent Amusement Co. v. *United States,* 323 U. S. 173;

United States v. *Bausch & Lomb Optical Co.,* 321 U. S. 707;

Interstate Circuit, Inc. v. *United States,* 306 U. S. 208;

Paramount Famous Lasky Corporation v. *United States,* 282 U. S. 30;

United States v. *American Tobacco Co.,* 221 U. S. 106;

United States v. *Reading,* 226 U. S. 324.

Statutes Involved

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. §§ 1, 2):

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§ 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The Issues and the Rulings Below

The original complaint in this action was filed on or about August 1, 1939. A first amended complaint was filed on May 7, 1941. A second amended complaint was served at the opening of the trial and the clerk of the District Court has certified that it was not formally filed. The principal producers and distributors of motion pictures in the United States were named as defendants in the original complaint, but were not named defendants in the second amended complaint upon which this proceeding went to trial.

The second amended complaint charged the appellants with violating Sections 1 and 2 of the Sherman Act by combining and conspiring with each other, and with each of the distributors of motion pictures, to restrain interstate commerce in motion pictures in practically all situations where the appellants operate theatres, and by having attempted to monopolize, by having monopolized, and by having combined and conspired with each other and with the distributors to monopolize, the first- and preferred-run exhibition of motion pictures in practically all situations where the appellants operate theatres. Plaintiff alleged that these

illegal restraints were accomplished by action on the part of distributors in (1) granting Schine theatres first- and preferred-run in preference to all competing theatres; (2) refusing to license pictures on a local competitive basis in any situation where Schine operated theatres; (3) granting greater privileges to the Schine theatres than normally granted to other exhibitors; (4) refusing, in many instances, to sell a second or subsequent run to theatres in opposition to the Schine theatres; (5) granting unreasonable protection to the Schine theatres over other theatres; (6) licensing pictures to Schine at rentals considerably less than those charged other exhibitors; and, (7) licensing to Schine theatres pictures greatly in excess of their requirements. It was alleged that the Schine theatres have secured these advantages by virtue of their combined purchasing power. It was alleged, further, that the appellants have forced competitors out of business and have discouraged competition in towns in which appellants operated theatres.

By their answer appellants denied each and every conclusory allegation of wrong-doing and each and every allegation of fact in support thereof.

Trial of the case began on May 31, 1944 before Judge John Knight of the United States District Court. The Government's case did not deal with any facts or circumstances occurring after May 19, 1942. Its case in substance consisted of (1) contracts entered into by the appellants with the distributors; (2) testimony concerning the size of appellants' theatre operations, and the history of their acquisition of theatres; (3) evidence of advertisements issued by appellants concerning the opening of new theatres; (4) testimony of other motion picture exhibitors concerning their conversations with agents of the distributors and

contracts entered into by them with distributors; (5) inter-office memoranda between agents of the distributors.

Appellants objected strenuously to the admission in evidence of these inter-office memoranda and conversations by exhibitors other than Schine with agents of the distributors. Appellants urged that these writings and conversations were not binding on them. Appellants also urged that since these declarations constituted the *only* matter tending to connect the distributors with any conspiracy they were not admissible over the objection of appellants, who were not present when they were made. Appellants further urged that these communications should in no event be received as proof of the statements contained therein. The trial court, however, admitted these declarations subject to connection. Although never connected, practically all of them were retained in evidence in spite of appellants' later motion to strike them from the record.

The trial concluded on November 10, 1944. Plaintiff submitted its brief on December 26, 1944, therein gave its version of the evidence and asked for injunctive relief and "the sale of specific theatres in each town where the defendants were shown to have eliminated previously existing independent competition." Appellants filed their requests for findings and brief in support thereof on January 24, 1945, and asked that the complaint be dismissed.

On October 8, 1945, Judge Knight handed down his opinion in which he found each and all of the appellants to have violated Sections 1 and 2 of the Sherman Act. This opinion is annexed hereto as Appendix A.

On November 1, 1945, the Court entered its judgment and filed its findings of fact and conclusions of law. The same had been submitted by the plaintiff and were signed

without change by Judge Knight. Section I of the judgment adjudged each of the appellants to have violated Sections 1 and 2 of the Sherman Act. Section II enjoined each of the appellants in specified respects; Section III ordered that appellants and their affiliated corporations be dissolved, realigned, or reorganized, and directed the submission of plans therefor. Section IV ordered a retention of jurisdiction.

On November 10, 1945, the appellants filed a motion pursuant to Rule 52(b) of the Rules of Civil Procedure to amend and supplement the Court's findings of fact and conclusions of law and to amend the judgment accordingly. At plaintiff's request, hearing of said motion was postponed until February 4, 1946, and on February 1, 1946 plaintiff filed its motion to amend the findings of fact, conclusions of law, and judgment.

In their brief in support of their motion under Rule 52(b), appellants pointed out, among other matters, that the evidence showed: that 25 of the theatres operated by Schine were so operated only because they had reverted to Schine upon the bankruptcy of Fox-Metropolitan Theatres, Inc. which had previously leased them from Schine; that in most of the situations in which Schine operated the only theatre in a town there had been no theatre there until Schine came there or that the theatre purchased was then the only theatre in the town; that in many cases where Schine owned all the theatres in a town, these theatres had been under single ownership before the purchase by Schine; that there was no evidence whatever of any pressure exerted by Schine on the distributors; that Schine did not deprive other exhibitors of any first or second run pictures; that there was no evidence whatever that the clearances granted

to Schine were unreasonable; that the agreements not to compete entered into between Schine and persons from whom it purchased theatres were of reasonable duration, and were usual and proper in the sale of good will; that no special privilege to Schine was involved in allowing Schine to deduct the expense of special attractions from gross receipts in determining the license fees to be paid for motion pictures on a percentage of gross receipts basis; that the evidence in the case related only to the period up to May 19, 1942; that in all matters the individual appellants herein were acting for the corporate appellants; that there was no evidence whatever of any conspiring by the distributors; that there was no improper lowering of admission prices by Schine; that the appellants are in fact a single exhibitor.

In this brief appellants urged, further, that there was no evidence of a violation of Sections 1 and 2 of the Sherman Act, and that there could be no contract, combination, or conspiracy in restraint of trade since the Schine appellants were in fact one exhibitor and there was no evidence that the distributors had combined or conspired with this exhibitor to restrain trade.

On March 8, 1946, Judge Knight handed down his opinion and decision granting appellants' motion to amend the findings only in a few and least material respects, and plaintiff's motion in practically all respects. This opinion is annexed hereto as Appendix B. The Court stated therein:

> "The Findings made by the court follow closely the opinion. It is usually the practice of this court to ask the prevailing party to submit Findings. No need has been seen for asking an unsuccessful party to submit Findings. The latter has the opportunity to present the record on appeal."

On March 29, 1946, the Court filed its amended findings of fact and conclusions of law and also an amended judgment. The original judgment was amended by the amplification of the injunctive provisions and the elimination of the direction for the submission of plans for the dissolution, realignment or reorganization of the appellants. An appeal from this amended judgment to this Court was allowed by order of the District Court dated April 17, 1946, but on December 16, 1946 this Court dismissed the appeal for want of a final judgment (*Schine Chain Theatres, Inc., et al.* v. *United States*, No. 571, October Term, 1946).

On February 25, 1946, the plaintiff had filed its "Plan of Reorganization of the Schine Circuit Proposed by Plaintiff and Memorandum in Support Thereof." This plan proposed that all but 38 of appellants' theatres be sold by a trustee to be appointed by the Court. It provided, further, that no appellant be allowed to buy or book pictures for a theatre in which it did not have a financial interest, and that no appellant be allowed to acquire a financial interest in any theatre except upon an affirmative showing that such acquisition will not unreasonably restrain competition.

On April 1, 1946, appellants filed their objections to the plaintiff's plan. While reiterating their objection to the Court's findings of fact and conclusions of law, appellants pointed out at length that even assuming the validity of these findings and conclusions, there was no basis whatever for the drastic and unprecedented relief sought by the plaintiff. The trial of *United States* v. *Paramount Pictures, Inc., et al.* (which later resulted in the opinion published in 66 F. Supp. 323) was then in progress and Judge Augustus N. Hand, presiding over the Statutory Court in that case

had indicated that the Court was not disposed to divest of their theatres the major distributors-exhibiters of motion pictures in that case. This was pointed out to Judge Knight.

Appellants pointed out that plaintiff's evidence had related solely to appellants' operations in 32 towns, that in many instances plaintiff sought to divest appellants of theatres as to which there had been no evidence whatever, no evidence showing that they were involved in any restraint of competition. Appellants treated separately each town in which plaintiff asked that they be divested of their theatres and pointed out the situations as to which there had been no evidence, and the situations where the evidence clearly showed divestiture to be an inappropriate and improper remedy for the violations as found by the Court.

Appellants also protested vigorously against the propriety of ordering the sale of their property by a trustee. They asked that plaintiff's plan be rejected *in toto*.

On May 28, 1946, appellants filed "Defendants' Proposals Regarding Re-alignment of the Schine Circuit." Appellants therein proposed three separate plans of realignment, each of which contemplated the creation of separate and different corporations to own and operate theatres in specified localities, each corporation to have officers, directors, and stockholders different and distinct from those of the other corporations. Plan 3, for example, provided for three corporations, one of which would own or lease, and manage, the theatres involved located in the State of New York, a second, the theatres involved located in the State of Ohio, and the third, the theatres located in Delaware, Maryland, and Kentucky. J. Myer Schine would own all the stock of the first corporation, Louis W. Schine all the stock of the second, and Mrs. J. M. Schine and Mrs. L. W.

Schine all the stock of the third. Appellants proposed that each corporation should license motion pictures separately and maintain separate office facilities, and that each should be subject to the injunctive provisions of the judgment, except those having to do with the sale or acquisition of theatres. The appellants further proposed that each corporation would arbitrate the question of the reasonableness of any clearance obtained by it and would not enter into any franchise agreements with the distributors.

Appellants submitted these proposals as consonant with the relief approved by this Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

At the same time as appellants filed these proposals concerning the realignment of the Schine Circuit, they made a motion before the District Court for an order directing that hearings be held at which testimony might be taken concerning the means of effectuating Section III of the amended judgment, relating to the realignment, reorganization, or dissolution of the Schine Circuit, and concerning the plans for said realignment submitted by the respective parties.

Appellants called to the attention of Judge Knight the decision in the *Paramount* case immediately after it was rendered on June 11, 1946, and pointed out to him that there the Court, despite its findings of conspiracy and violations of the Sherman Act, had refused to require the major distributors-exhibitors to sell their theatres.

On June 24, 1946, the District Court denied the motion to take testimony.

On July 5, 1946, the Court handed down its opinion, without any additional findings, adopting the general features of the plan proposed by the plaintiff. This opinion is annexed hereto as Appendix C. Concurrently with handing down this opinion, the Court entered its order (entered

on July 5, 1946, but stating on its face "Entered this 2d day of July, 1946.") for the purpose of effectuating Section III of the amended judgment. This order (annexed hereto as Appendix D) decreed that appellants' interest in 40 or more theatres be sold by a trustee to be appointed by the Court subject to the approval of the Court, and that the proceeds of the sales be held in the custody of the Court. The theatres involved are in many instances theatres concerning which there is no evidence whatever in the record other than the fact that they are part of the Schine Circuit of theatres. The order further required the dissolution of pooling arrangements in three towns, and forbade each appellant from acquiring financial interests in any additional theatres except on an affirmative showing that such acquisition will not unreasonably restrain competition, and from buying or booking films for any theatre other than those in which the appellant owns a financial interest.

The order also contained a stay pending final determination of any appeal taken therefrom. On July 15, 1946, appellants made a motion to have the order amended or clarified to provide that the stay was applicable to all parts of the order and to direct the entry of a formal judgment in conformity with the terms of the order, or, in the alternative, to designate the order as a final appealable order. Said motion was heard the same day, and the Court ruled that the stay contained in the order of July 5, 1946 applied to the entire order and that said order is to be construed as final.

The Questions are Substantial

The questions raised by this appeal relate both to the sufficiency of the admissible evidence to support the District

Court's conclusion that the appellants violated Sections 1 and 2 of the Sherman Act and the propriety of the relief granted by that Court. All the questions which are here stated to be substantial were properly raised before the District Court. Questions relating to the admissibility of proof were raised by objections to the admission of the evidence and by motions to strike the same; questions relating to the sufficiency of the evidence to support material findings of fact and conclusions of law were raised by appellants' requests concerning findings of fact and conclusions of law and by appellants' motion to amend and supplement the findings of fact and the conclusions of law; questions relating to the propriety of the relief here granted were raised by appellants' requests concerning findings of fact and conclusions of law, by appellants' objections to plaintiff's plan, by proposals concerning the method of effectuating Section III of the amended judgment, and by appellants' motion to take testimony concerning the plans submitted to effectuate said section of said judgment. All the points here stated to be substantial are fully covered by appellants' assignment of errors.

1. The first substantial question raised by this appeal concerns the propriety of requiring the sale of theatres which were not shown by the evidence to have any relation to, or to have any part in, any restraint of trade or commerce or monopolization of, or attempt to monopolize trade or commerce.

The District Court has ordered the sale of many theatres as to which there is no evidence in the record apart from the fact that they are part of the Schine Circuit of theatres. Since the purpose of injunctive relief under the

Sherman Act is remedial and not penal (*Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409), a most serious question is certainly raised by the imposition on appellants of provisions which are admittedly not remedial of any violations of the Act as found by the Court but explainable only on the theory of punishment. The lack of any relationship between the relief granted and the violations found was clearly conceded by the District Court. When this matter was brought up with respect to certain theatres on the argument of appellants' motion to take testimony on the plans submitted to effectuate Section III of the amended judgment, the Court stated:

> "You would have the benefit of that on appeal. If it were necessary to have shown in this case the necessity of selling those five theatres, you would have the benefit of it, if it were necessary to be shown, and it was not shown on the trial.
>
> "Mr. Hays: How would I have the benefit of it?
>
> "The Court: Because of lack of proof."

Later the Court stated:

> "Well, then, the question is whether the Court, by and large, in the absence of any testimony as to competition or anything else, has the right to include that town in the whole plan of reorganization."

The resultant decree as concerns divestiture is accordingly absolutely arbitrary, having no relation to the Court's findings or the violations of the Sherman Act claimed to have been committed. No better example can be given than the fact that the decree requires appellants to give up one of their two theatres in Cumberland, Maryland, although

their acquisition of the second theatre in that town was approved by the Court in this very proceeding.

2. The second substantial question raised on this appeal concerns the propriety of the District Court's denial of appellants' motion of May 28, 1946 to take testimony concerning the means of effectuating Section III of the amended judgment and concerning the plans submitted by the parties for that purpose. If, as appellants claim, any relief by way of realignment, reorganization, or dissolution of appellants' theatre holdings should have been remedial of the violations found, then it was certainly error to refuse to take testimony on this point. Plaintiff's plan then before the Court recommended divestiture of theatres in many towns where there was not a scintilla of evidence as to the existing competitive situation; and the Court ultimately ordered divestiture in such towns. Appellants' motion to take testimony was made in order that such relief as might be granted would have basis in facts before the Court, and the subsequent failure to adopt a decree having such a basis will not only prejudice appellants by needlessly requiring them to dispose of their theatres, but will, appellants assert, seriously damage the public interest by impairing and restricting the competition now existing in the towns involved.

3. The third substantial question involved in this appeal is whether the record in this case affords any basis for the Court's granting relief by way of realignment, reorganization, or dissolution of appellants' theatre holdings. When the District Court entered its judgment of November 1, 1945, and its amended judgment of March 29, 1946, in which it decreed that appellants' theatre interests be re-

aligned, reorganized, or dissolved, it was under the distinct impression that the relief in this proceeding should be punitive. On May 28, 1946, in the course of argument on appellants' motion to take further testimony, the Court stated:

> "The Court: Well, it isn't solely a question of restoration of competition. The question is, perhaps, a question of punishment. The Court has found a violation of the Anti-Trust Law. Assuming that the evidence pertaining to a single theatre town, the theatre owned by Schine, disclosed that as a result of their conspiracy or their actions somebody has been wiped out of existence, it wouldn't simply be a question of competition; it would be a question of penalizing the defendant under those particular circumstances because of his acts."

Although the Court disclaimed any purpose to punish appellants, when it later handed down its decree ordering divestiture rather than realignment or reorganization, it is clear, both from the above quotation and the provisions of the order itself, that the Court acted upon an incorrect and improper theory of relief in deciding upon this type of decree rather than upon any basis of fact appearing in the record. Accordingly, appellants' assertion that there is nothing in the record in the case to justify such relief merits plenary review on appeal.

4. The fourth substantial question on this appeal is whether the District Court was justified in ordering divestiture, the most drastic remedy conceivable and as here applied without precedent in the enforcement of the Sherman Act. In *United States* v. *Paramount Pictures, Inc., et al.*, 66 F. Supp. 323, the Government asked the Court to

divest the major distributors of motion pictures, who are also the major exhibitors of motion pictures, of their theatres. While the Court found these defendants to have violated the Sherman Act, and while the number of theatres operated by them by comparison makes appellants' interests appear insignificant, the Court refused to order divestiture. It stated (66 F. Supp. 323, 353):

> "It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to effect a proper degree of free competition."

Appellants contend that the plans which they submitted to the Court provide for completely adequate relief—assuming the adjudicated violations to exist in fact—and that in any event it was wholly improper to order the sale of appellants' land and buildings, without giving appellants the opportunity to convert this substantial property to some use in no way connected with the motion picture business.

5. The fifth substantial question on this appeal is whether the District Court was justified, in any event, in ordering the appointment of a trustee to sell appellants' property and the payment of the proceeds of the sale into Court for disposition according to order of the Court. It seems certain that such an order is beyond the power and jurisdiction of the Court in this proceeding. *De Beers Consolidated Mines, Ltd.*, v. *United States*, 325 U. S. 212, 219-220. Furthermore, and in any event, the order constituted a clear abuse of discretion. There is no evidence or indication whatever that appellants would not comply in

good faith with any order of the Court directing them to sell their property, and the order directing the appointment of a trustee to sell the property not only makes appellants liable for the compensation and expenses of the trustee and harasses appellants' business by giving the trustee access to appellants' books and records and to the time of its officers and employees, but has the prime vice of disallowing appellants from negotiating these sales on such terms as will involve the least pecuniary loss to them.

6. The sixth substantial question involved is the propriety of enjoining the appellants from selling any theatre interest pending further order of the Court. This provision is contained in paragraph 4 of Section II of the amended judgment of March 29, 1946. The gravamen of the complaint herein centers around the alleged magnitude of appellants' theatre interests, and the drastic relief here granted orders the sale of many of these interests. Enjoining appellants from selling any other theatre interests unduly proscribes appellants' disposition of their property and can have no conceivable relationship to the furtherance of the relief sought or granted in this proceeding.

7. The seventh substantial question involved is the propriety of enjoining the individual appellants herein as individuals. Everything done in the matters here involved by the individual appellants herein, J. Myer Schine, Louis W. Schine, and John A. May, was done as officer, director, or agent for the corporate appellants. It was therefore improper to enjoin them as individuals. *Hartford-Empire Co. v. United States*, 323 U. S. 386, 428, 433-434.

8. The eighth substantial question is whether the District Court committed error in receiving as evidence many

letters or reports written by employees of certain of the major distributors to other employees or officers in the same company, and whether, in like manner, the Court erred in allowing testimony concerning oral communications made by these employees to appellants' competitors in the motion picture business. No one having any connection with appellants was present when these communications were made, and appellants contend that the declarations were inadmissible since they constituted the only proof tending to connect the distributors with any combination or conspiracy. *Glasser* v. *United States*, 315 U. S. 60, 74-75. The District Court did not abide by the rule that there must be proof of his participation in a conspiracy *aliunde* before the declarations of the non-defendant conspirator are admissible. The Court stated in its opinion: "Statements and [illegible] of agents or representatives within the scope of their authority indubitably are admissible to show a conspiracy."

The admission of these communications prejudiced appellants in two most material respects. In the first place, finding the distributors to be parties to some combination or conspiracy was absolutely essential to the conclusion that appellants had violated the Sherman Act as charged. The corporate appellants herein are in fact a single exhibitor, since the appellant Schine Chain Theatres, Inc. owns 100% of the stock of all the other corporate appellants, and there is nothing unlawful in this single exhibitor doing the acts here charged and found. See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 183. The corporate appellants could not conspire with the individual appellants, who were their own officers, directors, and agents, and accordingly did not violate the Sherman Act unless they

conspired with the distributors. The Court was therefore in error in holding that it was immaterial whether the distributors or any one of them were members of a conspiracy. Moreover, the use of these communications as the sole support for finding the distributors parties to any combination or conspiracy, was gravely prejudicial to appellants.

The second respect in which appellants were seriously prejudiced by the admitting of these communications was the Court's subsequent use of statements contained therein as the factual basis for the conclusion that appellants had violated the Sherman Act as charged. In *United States* v. *Griffith Amusement Co.*, 68 F. Supp. 180, a Sherman Act proceeding against another circuit of theatres, the Court refused to admit the distributors' inter-office memoranda and later gave judgment for the defendants.

9. The ninth substantial question raised by this appeal is whether there is evidence to support the District Court's findings and whether the findings supported by evidence are sufficient to sustain the judgment of the Court that appellants have violated the Sherman Act. The findings which led the Court to this conclusion were clearly stated by the Court and it requires no extensive analysis of the record to show that they are either not supported by the evidence or fail to support the conclusion of violation of the Sherman Act. The finding that appellants arbitrarily deprived other exhibitors of first and second run pictures is based on the fact that where the distributors sold first or second run to Schine theatres they were unavailable to other exhibitors, the distributors having only one of such commodities to sell in any given town. The only hint that any favoritism was shown to Schine is found in certain

testimony by Schine's competitors of declarations made by certain of the distributors' agents. As stated, the admissibility of such testimony of itself raises a substantial question.

The Court found, further, that Schine secured unreasonable clearances, and stated that "the matter of clearance is of major importance in the consideration of the issues herein." There is no proof whatever that the clearances sold to the Schine Circuit were unreasonable. The reasonableness of clearance in any given instance depends on a great variety of factors (see opinion in *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 343) as to which there was no evidence before the Court. For this finding the Court again relied on certain declarations of the distributors' agents which appellants contend were inadmissible for any purpose, and in any event, incompetent and irrelevant as concerns the reasonableness of clearance.

The making of "threats" to build or open theatres, found by the Court, was in fact nothing other than the normal and usual business practice of merchants in announcing opening of new places of business; the lowering of admission prices is a normal consequence of the competitive process and certainly does not sustain a judgment of violation of the Sherman Act; obtaining film rental concessions from the distributors was not shown to involve any favoritism to the Schine theatres; non-competing agreements entered into with persons who sold theatres to Schine were the usual type of agreements normally to be found in any sale of a business involving good will; the franchise agreements in this case did not violate the Sherman Act. *United States* v. *Griffith Amusement Co.*, 68 F. Supp. 180.

10. The tenth substantial question raised by this appeal is whether the District Court properly drew an inference unfavorable to appellants' case from the fact that appellants did not call more than six of the distributors' branch and exchange managers to testify on their behalf. Relying on the case of *Interstate Circuit* v. *United States*, 306 U. S. 208, the District Court held that appellants' failure to call more agents of the distributors "weakened" the defense herein and was persuasive that their testimony would have been unfavorable to appellants.

Before any inference whatever can be drawn from the failure of a party to call a person as a witness, it must be shown that the person was under the control of the party against whom the inference is to be drawn. *Tin Decorating Co.* v. *Package Corporation*, 37 F. (2d) 5 (C. C. A., 2nd, 1930). The agents of the motion picture distributors were certainly not under appellants' control. The District Court apparently overlooked the fact that in the *Interstate Circuit* case the distributors were defendants, and that it was from the failure of the distributors to call their own employees as witnesses that this Court drew the inference which the District Court erroneously drew in the present case.

The extent to which the Court's findings and judgment rest on this erroneous inference raises a substantial question which should be reviewed by this Court.

The questions raised on this appeal were not disposed of in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. While the question of the admissibility of the distributors' inter-office memoranda was there raised, this Court did not pass on the question since the appellants had

failed to show any prejudice. There can be no doubt of prejudice in the present case, if as appellants herein claim, these memoranda and other communications were improperly received.

The appellants in the *Crescent* case claimed that the United States had failed to prove the allegations of the complaint, but the Court refused to consider this question, since it had not been assigned as error. This question, and similar questions raised by appellants herein, are fully covered by the assignments of error.

The appellants in the *Crescent* case complained of the divestiture provisions in the decree. But those provisions are far different from those imposed in the present case. The decree in the *Crescent* case merely required a realignment of stock interests in the corporate defendants; it did not require the corporate defendants to dispose of their theatres, and did not provide for the appointment of a trustee to dispose of the property to be divested.

The other questions raised by this appeal were not in anywise involved in the *Crescent* case. Appellants are of the belief that all the questions here raised are substantial and respectfully petition this Court to pass on them after plenary hearing.

Respectfully submitted,

WILLARD S. McKAY,
Counsel for Appellants.

January 7, 1947

HAROLD R. MEDINA,
ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
RICHARD T. DAVIS,
Of Counsel.

APPENDIX A

Opinion of John Knight, *U.S.D.J.*
(October 8, 1945)

United States District Court

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,*	
v.	Civil No. 223
SCHINE CHAIN THEATRES, INC., *et al.*, *Defendants.*	

Appearances:

WENDELL BERGE, *Assistant Attorney General;*

ROBERT L. WRIGHT, JOHN P. CLAGGETT, HAROLD L. SCHILZ, ALBERT BOGGESS, *Special Assistants to The Attorney General;*

PHILIP MARCUS, MILTON KALAS, *Special Attorneys;*

GEORGE L. GROBE, *United States Attorney; For the United States;*

EDMUND MCCARTHY, *Attorney of record;*

WILLARD S. MCKAY, EDWARD F. MCCLENNEN, SAUL F. ROGERS, ARTHUR J. HOMANS, ARTHUR H. WHITEMORE, HOWARD M. ANTEVIL, *of Counsel for Defendants.*

KNIGHT, *District Judge:*

This suit is brought by the United States to restrain violations of Sections 1 and 2 of the Sherman Act (28 Stat. 209, 15 U. S. C. Secs. 1 and 2). Schine Chain Theatres,

Inc., a New York holding and service corporation, five other corporations in which Schine Chain Theatres, Inc. owns all the stock, to wit, Schine Theatrical Co., Inc., an operating company, Schine-Lexington Corporation, a holding company, Schine Enterprise Corporation, a service corporation, Schine Circuit, Inc., a service corporation, and Chesapeake Theatre Corporation, a holding corporation, and also three individuals, J. Meyer Schine, Louis Schine and John A. May, are the defendants. Hereinafter the corporate defendants will be referred to as "Schine", the "Schine Circuit" or as "the Circuit".

This organization has seen an exceedingly rapid growth. Its origin was the purchase by defendants J. Meyer Schine and Louis Schine of three theatres in Gloversville, New York, in 1920. In the twenty-one years following, these defendant corporations acquired, either as purchaser or as lessee, an interest in 175 theatres and in addition some 42 separate parcels of real estate for theatre purpose, or connected with such purpose. The development came about in this manner. Schine Chain Theatre, Inc., the parent corporation, was organized in 1920. The above-named subsidiary corporations came into being in the several years 1926, 1935, 1937 and 1938.

Steps following in line with the purpose of the "Schine Circuit" were the organization of realty holding corporations and what may be termed local corporations, or the taking over of others of such for the operations of theatres. Since 1931, there have been 118 theatre corporations in which an interest has been acquired by "Schine". As of the time of the commencement of this suit there were 62 of such operating corporations and in 48 of these "Schine" owned 100 percent of the stock, in 12, 50 percent. Schine operates 93 theatres in 73 towns (including cities). The towns run generally in population from 5000 to 35000 and include 39 in New York, 16 in Ohio, 8 in Kentucky, 7 in Maryland, 2 in Delaware and 1 in Virginia. In addition to its theatrical and realty operations, "Schine" has booked and bought for

and supervised 37 theatres since 1931, and when this suit was brought there were 27 for which it so acted. Since 1928 the closed towns (those in which there was no opposition) show a total increase of 56. In 1941 there were only 3 towns in which Schine's competitors (hereinafter called independents) were playing major film product. In a single season, 1939-1940, Schine paid $1,647,000 to six film companies. The "Schine Circuit" buying power beyond peradventure was extremely large, and its opportunity to utilize this power in the purchase of films to the detriment of its competitors is apparent. These defendants together control the largest independent theatre circuit in the country. For theatre acquisitions and capital improvements there has been expended admittedly upwards of $10,948,100, not including dividend payments on operating expenses and cash on hand.

Some of the computations as hereinbefore shown are not the same as those claimed either by the government or by the defendants. These computations are made from defendants' extensive answers to interrogatories. The differences are not of material moment. There are eight so-called major film companies: Fox, Loew, Paramount, Radio-Keith-Orpheum (RKO), Warner, Columbia, Universal and United Artists. Columbia and Universal produce and distribute films; United Artists only distributes; and the other companies both produce and distribute films and operate theatres. These eight companies supply "Schine" a large percent of the feature films used by him and together receive upwards of 75 percent of the total film rental paid by Schine. All of them originally were made parties to this suit, but all have since been dropped as such. However, each is claimed to have participated separately with Schine in the conspiracy charged and in aid of Schine's monopolization of the film exhibiting business. The principal sales office of each major distributor company is in New York City and that city serves theatres here involved. The methods of licensing and servicing of films is similar with each. Each has its district manager and branch manager. The feature films

are mostly produced in California where the negatives are taken, the prints being generally manufactured in New York and New Jersey. Film license applications are solicited by salesmen from the branch office, and the delivery and return of films are made through the branch. Prints of films are sent from the various exchange offices in the various states to the exhibitors of the main office, though the recommendation for approval ordinarily is made by the branch manager who is close to the situation. It was the usual custom for the distributors to make license agreements for feature films for a period of a year commencing about September. These license agreements were made before the films were produced. Ordinarily each major producing company put out 40 to 60 feature films a year and these were released at the rate of about one a week. Now the practice generally is to sell group pictures only after production and in groups rather than for a year.

The individual defendants hold the principal offices in the defendant corporations and hold other offices in the various so-called local corporations. They are the principal stockholders in the parent corporation and have general supervision of the operations of the circuit. The film buying for the circuit and the companies in which it had an interest was conducted through "Schine" or one of its subsidiaries. Lazar, a regional manager for "Schine" covering several states, and Silverman and Hensler, district managers, and one Insley, principally carried on negotiations for acquisitions, though the defendants Schine and May engaged directly in some, while one Lynch was "the Circuit's" chief film buyer. In circuit buying "Schine" generally negotiated deals with the division manager. The agreements so made are referred to as "master agreements and deal sheets," but these were usually followed by license agreements signed by the chief sales executive of the distributors.

To substantiate its claims that these defendants have violated the aforesaid provisions of the Sherman Act, the government contends that they have used their great buy-

ing power to suppress competition by bringing about various restrictions on the competitors' ability to compete, resulting in persuading the competitor either to sell to "Schine", operated on an inferior basis or join in pooling his interests with "Schine"; that this suppression has been brought about in various ways, to wit: by depriving independents of first and second run products, either entirely or to such a time as materially lessened income and force sales or abandonment, by implied threats voicing "Schine's" great buying power, by threats to construct theatre buildings to discourage other construction, by cutting admission prices, by inducing theatre sales through agreements to employ sellers, by fixing by agreement the duration of time and the distance within which an independent selling should not be permitted to compete and by unreasonable clearances obtained from the distributor. These generally are the claims. The defendants' denial make the issues.

Section 1 of the Sherman Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states * * * is hereby declared to be illegal * * *", and

Section 2 of that Act provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, * * * shall be guilty of a misdemeanor."

Said the court in *Northern Securities Co. v. United States*, 193 U. S. 197 (404): "All that is added to the first section by section 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce." "* * * the two sections overlap in the sense that a monopoly under section 2 is a species of restraint of trade under section 1." United States *v.* Socony-Vacuum Oil Co., 310 U. S. 150 (226).

Any question as regards the applicability of the Sherman Act in certain respects here shown has been clearly answered by the decision of the Supreme Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. Under definitely comparable facts that Court held: 1. That this court has jurisdiction. 2. That it is immaterial whether the distributors or any one of them were members of a conspiracy or joined in the effort to monopolize. 3. That while the business or the showing of motion pictures is local, a combination of exhibitors may violate the Sherman Act by using their collective buying power to restrict or restrain competitors. 4. That the relationship between the circuit members is such that they may be capable of conspiring or combining with each other in violation of the Act. 5. That the circuit, in essence, is not a single exhibitor. "All three phases of the motion picture business * * * constitutes a part of interstate commerce." *William Goldman Theatres, Inc.* v. *Loew's*, opinion filed August, 1945 (3d C.).

In the Crescent case twelve theatre operating companies, and certain individual stockholders, as well as distributor companies, were charged with the violation of the Sherman Act in combining with each other and with major distributors to effect monopolies. This language from the opinion supports the statement as to the aforesaid conclusions: "And as we have said, the course of business which involves the regular exchange of film in interstate commerce is adequate to bring the exhibitors within the reach of the Sherman Act" and "The District Court found that some of the exhibitors were co-conspirators on certain phases of the program. But we can put that circumstance to one side * * *. For it is immaterial whether the distributors technically were or were not members of the conspiracy." and "But action by a combination of exhibitors to obtain an agreement with a distributor whereby commerce with a competing exhibitor is suppressed or restrained is a conspiracy in restraint of trade and a conspiracy to monopolize a part of the trade or commerce among the States." Sustaining the

action, the court necessarily held the Circuit is not in essence a single exhibitor; and that there can be concerted action between a corporation and its wholly owned subsidiaries, and the fact that defendants owned one-half or less per cent of the stock of corporations who are not parties herein does not preclude consideration of acts done by these corporate officers or by defendant's acts in connection with such corporation. Vide also: *Chicago Board of Trade* v. *United States,* 246 U. S. 231; *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30; *Interstate Circuit* v. *United States,* 306 U. S. 208; *United States* v. *General Motors Corp.,* 121 F. (2d) 376, cert. denied 314 U. S. 618, 708.

The defendants assert that buying the only theatre in a town and building additional theatres, or buying additional theatres, or advising of intention to open another theatre, or making known the product buying ability of the chain, or buying product on better terms than a competitor, or becoming large by normal growth, causing inability of inferiorly operated theatres to get good product, or agreeing with the seller of a theatre not to compete within defined limits for any period of time, cutting or raising admission prices, obtaining clearances, or using so many pictures that demand for product of minor distributors is increased, does not monopolize or restrain trade or commerce among any of the several states. "We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act." Cresent case supra. Obviously, doing any one of the aforementioned things, disassociated from any other act, would not be violative of the Sherman Act; but surely a circuit may so utilize one or more of such efforts as to illegally stifle competition or monopolize the theatre business in different locations. Motive is essential.

The defendants say that the Sherman Act prohibits only unreasonable restraint of trade and that it must affect trade or commerce between states. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469. There can be no question that this is a correct

statement of law. The Act does not condemn monopolies as such, but prohibits monopolization or attempts to monopolize trade or commerce between the states. The verb monopolize comprehends conduct or actions. *Standard Oil Co.* v. *United States,* 221 U. S. 1. Through monopolization a monopoly may be secured. We are concerned here with what are claimed to be unreasonable restraints of trade. The word unreasonable as so used is broad enough to include a conspiracy in restraint of trade and monopolization of a business in restraint of trade. Unreasonable, as used in the statute, refers to a degree of restraint. Defendants further assert that the Act does not condemn restraints of trade which do not have a direct and immediate effect upon interstate commerce. The contrary of this assertion, as applicable here, is decided by the Crescent case, supra. Defendants also say that an agreement for purchase of product coupled with clearances over succeeding runs is valid, citing *Standard Oil Co.* v. *United States, supra.* Of course the mere agreement for the purchase of first runs and reasonable clearances is within the law; but the charge of a conspiracy contemplates a "combination of two or more persons by some concerted action to accomplish * * * an unlawful purpose" and monopolization contemplates acts to monopolize or control trade or commerce between the states to the exclusion and disadvantage of others.

The record herein includes 4728 pages of testimony and 1380 exhibits. We are here concerned with 32 different situations, each involving the testimony of various witnesses and numerous exhibits. It is not only practically impossible to set out in this opinion every phase of the testimony which has been presented, but it is unnecessary.

Many objections were raised by the defendants to the reception of evidence of inter-department communications and statements of and communications from representatives of the distributors. These objections were based, both on the ground that such were incompetent in the absence then of proof of a conspiracy, and also that there was no proof of the

authority of such representatives to make the declarations or give the communications.

It is not necessary that proof of the conspiracy be made before overt acts are proved. The order of the proof lies within the discretion of the court. "There is no hard and fast rule that the evidence of concert should be first put in. * * * The order of production of evidence is one largely in the discretion of the court." *Doyle* v. *United States*, 169 F. 625. Among other cases supporting this view are: *Eastern States Retail Lumber Ass'n* v. *United States*, 234 U. S. 600; *Cohen* v. *United States*, 157 F. 651, cert. denied 207 U. S. 596; *Paramount Pictures Inc.* v. *United Motion Picture T. O.* 93 F. (2d) 714; *Glaser* v. *United States*, 315 U. S. 60, cited by defendants, does not support their view.

Statements and acts of agents or representatives within the scope of their authority indubitably are admissible to show a conspiracy. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Erie RR. Co.* v. *Winter*, 143 U. S. 60; *Johnson* v. *J. H. Yost Lumber Co.*, 117 F. (2d) 53. Further, in conspiracy cases a great deal of latitude is permitted the court in the reception of evidence. "The rule will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." *Clune* v. *United States*, 159 U. S. 590. See also: *Williamson* v. *United States*, 207 U. S. 425; *Wiborg* v. *United States*, 163 U. S. 32; *Isenhower* v. *United States*, 256 F. 842; *White* v. *United States*, 80 F. (2d) 515.

There is a conflict in the testimony in many of the situations. The court recognizes the burden is cast upon the plaintiff to establish its cause and or causes of action by a fair preponderance of the proof. It is quite patent from the nature of the charges here that they have to be established by numerous acts and transactions having relation some way to the charge. These acts must be considered together to show intent, and intent to "combine," "conspire" and/or "monopolize" must be the reasonable and natural conclusions from the acts or transactions, as be-

lieved by the court. Ordinarily proof of such acts comes from circumstantial evidence and the inferences which are ordinarily drawn from these. As was said in *William Goldman Theatres, Inc.* v. *Loew's, supra:* "The picture of conspiracy as a meeting of a trio of sinister persons in pointed hats close together belongs to the dark ages," and further: "The requirement is to fit the inferential facts into the framework of the primary parts * * *." "It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, * * *." *Eastern States Retail Lumber Ass'n* v. *United States, supra.*

It is the opinion of this court that the defendants have violated Section 1 and Section 2, supra, of the Sherman Act, in that they have maintained an unlawful combination among themselves by means of which they have unreasonably restrained trade or commerce among the several states and have monopolized the business of operating theatres and the supplying of major films in various towns and cities, and that each of the major distributors hereinbefore named, by the methods which it has employed in its dealings with Schine and the independents, has aided and abetted these defendants in unreasonably restraining trade or commerce between the states and the "monopolization" of theatre operations.

The great film buying power of the defendant corporations gave opportunity to exert pressure on the distributors to obtain preferences. The extent of this film buying is demonstrated by the exceedingly large number of theatres controlled by "Schine" and the large amount of money which must have been paid for film rentals. The aggregate of the amount paid all distributors in total or for one season is not shown, but what the "Circuit" paid six of the major distributors, for features for a single season, does appear. This buying power included both closed and open towns. By combining the open and closed towns in Schine's deals with the distributors, Schine was enabled to dictate terms to the

distributors. This ability to dictate terms was further increased by the authority of Schine to buy product for theatres not owned or operated by it. Schine acquired by purchase or lease 55 theatres from 1922 to 1931, and 80 from 1936 to 1941, inclusive, 15 in 1938 and 15 in 1939.

The means and methods employed by the different defendant corporations through their officers and authorized representatives to obtain a "monopolistic" control were numerous. Principally among these were arbitrarily depriving independents of first and second run pictures, securing unreasonable clearances, making threats to build or open closed theatres to prevent construction or operation by independents, lowering admission prices, obtaining rental concessions, restricting independents who sold to Schine as to periods and places of operation, making long time franchise agreements covering the "Circuit."

Standing out as clearly indicative of intent to "monopolize" are communications and statements made by May, Lynch, Lazar, Hensler and Insley, undisputably authorized representatives of the defendant corporations. There are others from defendant J. Meyer Schine as well.

Some specific instances showing the predatory means used by "Schine" follow.

The Schine defendants arbitrarily deprived independents of the first run product which they had previously enjoyed in several towns. Independents were deprived of 1936-37 Columbia product at Norwalk; 1935-36 Fox product at Van Wert and Bucyrus; Loew's product for 1930-31 at Bellefontaine and for 1935-36 at Van Wert; Paramount's 1935-36 product at Van Wert and Bucyrus; RKO product for 1933-34 at Auburn and 1935-36 at Norwalk; of United Artists 1936-37 at Norwalk; and of Warner for 1933-34 at Norwich, 1936-37 at Norwalk, and 1941-42 at Harlan.

Independents were arbitrarily deprived of second run product which they had previously exhibited, losing 1938-39 Columbia at Rochester, Loew's 1935-36 at Van Wert, and 1934-35 Warner at Watertown. After "Schine" secured the

product from the independents for the aforementioned seasons, he retained it and the independent was unable to secure it in subsequent seasons. Relative to six towns including Corning, Lynch wrote on October 21, 1933, Metro: "If there are any other opposition towns where you believe you can sell a second run, I would appreciate it if you would take the matter up with me first before selling." In 1932 Lynch wrote Flynn a letter saying, among other things: "I want you to refrain from selling him (independent) any pictures whatsoever." and Metro through Flynn agreed not to do so. Lynch also wired Fox to withhold selling to this independent and wrote Fox' agent saying "have also asked him (Schmertz—Fox agent) to refrain from selling this man second run."

"Schine" was able to secure unreasonable clearances year after year in many towns. A few only need be mentioned. At Corning, New York, RKO permitted 90 to 180 days, and Fox permitted 160 days. At Seneca Falls, New York, Columbia and United Artists permitted 120 days. At Little Falls, New York, RKO, Columbia and Universal permitted 120 days and United Artists permitted 115 days. At Carthage, RKO permitted 120 days and United Artists 90. United Artists permitted 90 days at Watertown, New York, and 90 days at Amsterdam, New York; Bucyrus, Kent, Norwalk, Tiffin and Fostoria, Ohio; and Lexington and Van Wert, Kentucky.

The license contracts with "Schine" in many instances specified minimum admission prices for the various runs as well as clearance period. To an extent this affects adversely the time given the competitor. *Interstate Circuit* v. *United States, supra,* clearly points the reasons for condemning such provisions in a film license contract or agreement. Schine got clearance of Herkimer over Ilion where none existed before.

"Schine" made threats to build in various towns, such as Paris, where there was a sign up, Canandaigua by a sign and newspaper article published, and where he eventually

did build. In Perry, a statement by May and a newspaper article announcing that land had been bought for theatre purposes came at a time when "Schine" was trying to purchase the independent's lease. "Schine" did not build, but later got the lease. In Salamanca, just after independents acquired a site for a contemplated theatre, through the press "Schine" announced its intention to build. In Medina, "Schine" announced the making of an agreement to erect a new theatre immediately after independents started construction. In Mount Vernon, May contacted the independent to buy, saying "Schine" would build unless the deal could be put through.

Defendants' authorized agents made statements to independents which are reasonably construed as threats.

At Bellefontaine, during negotiations for the renewal of a lease with an independent, Lazar threatened to re-open the Opera House, if the independent opened the Strand.

With reference to Paris, Lazar told the independent, who was taking steps to build, that if the independent went ahead with his projects "Schine" would build a 1200 seat theatre in Lexington where the independent had a theatre and that the house would be run with 10¢ policy at all times. At Paris, Schine and an independent began construction at practically the same time. Lazar asked the independent to stop construction and see him about a deal. Subsequently Schine took over the independent's Lexington and Paris theatres under an agreement prohibiting for fifteen years the independent from engaging in the theatre business in any town in Kentucky where Schine had a theatre.

Just before Schine acquired the "Forum" theatre in Norwalk, Lazar advised an independent to "get in with us * * * we are a big company. You know what it means if you are not in with us." and further stated: "If you lease your theatre Mr. William Selman (part owner of the "Forum") will walk out of town."

At Van Wert, the operator of the "Ohio" theatre could not get first run product it had had. During negotiations

for the sale of the "Ohio" to Schine, Lazar said that Moore would have trouble getting product; Schine would have the first runs; and that Schine was interested in buying in order to raise prices.

At Lockport, during negotiations with "Schine" for the "Palace" theatre, May said it would be necessary to reopen the Hi-Art owned by "Schine" to use up "the large volume of product they had bought." This statement evidently was made to induce Reliance to sell the "Palace." In this instance it is to be noted that the independents experienced great difficulty in getting product. Hi-Art had then been closed for seven years. Metro, Fox, Universal and Loew's refused major product to the independent. Indicative of the attitude of the distributors is the letter from the Eastern Salesmanager of Loew's who wrote:

> "In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport, as well as other situations, and as we are hardly in a position to forego or jeopardize the business from their other situations, and for the further reason that they have for a number of years been a very representative account, we feel that our interests would be best served by giving them such consideration."

At Perry, May told the independent that "Schine" had bought a lot to build a 1000 seat theatre there. This was a town of less than 5000 population. The independent theatre building was owned by the town and leased to the independent. When May said this, a local newspaper article to the same effect was given out. Schine did not build but Herzberger sold shortly thereafter, and through the purchaser of this interest Schine acquired the lease.

Insley and May tried to buy an independent theatre at Seaford and Georgetown. Insley said it was foolish that the independent did not make a deal with "Schine" because he had recently purchased the theatre at Laurel and "Very likely, with the buying power they had they would get away

the product" from the independent. Insley said Schine had bought a lot with the intention to build a theatre in Seaford, and also said: "Well, if I were you I would sell the theatres to Schine because they are going to build a theatre there, and, naturally, they are going to get the product." Insley, under a written contract with "Schine", had authority "in negotiations for the acquisition of motion picture theatres within the above-described territory" (Delaware, Maryland, Virginia). Seaford and Georgetown are in Delaware.

At Rochester, J. Meyer Schine told independents, who were then building the "Webster", that the location was not appropriate, that it was too near the "State" (Schine's) and not justified; and Schine said he would build a theatre near the Murray theatre (owned by independents). The "State" and the "Webster" theatres were ¾ mile apart. Schine later took over the "Webster". Schine testified he said that it would not be sensible to build the "Webster", but denied that he said he would build near the "Murray."

At Seneca Falls, after an independent had taken steps toward building a theatre, a sign was placed on the Seneca theatre (shortly theretofore purchased by Schine) which read: "Closed for alterations. Will re-open soon as a Schine theatre." Independent then discontinued efforts to build. "Schine" did not re-open. Practically the same things recurred two years later. The same independent took steps to build. The sign re-appeared on the "Seneca". The independent did not go through with his plan. The "Seneca" did not open. It had not been open in several years.

After "Schine" opened a theatre within a town, it was arbitrarily able to keep the independents from opening a theatre in the town with suitable run products, as in Auburn, Lockport, Mt. Vernon, Paris and Bellefontaine.

"Schine" was able to monopolize first run product at Corbin, Medina and Lockport even though the physical facilities of the independents in those towns were better than Schine's. He was able to monopolize the first neighborhood run in Rochester even though the physical facilities of the independent were better.

The evidence discloses that "Schine" cut admission prices at Corbin, Geneva, Lexington, Malone, Ogdensburg and other towns; gave out cut rate tickets in Addison, good in his Corning theatre for students, and frequently engaged in two for ones and bank nights in other towns.

In cases of purchase or the assumption of leases other than those hereinbefore referred to, the agreements therefor provided for no competition by the independents for long periods of time. The non-competitive feature was also extended to cover outside towns, i. e.: Amsterdam, Ilion, Malone, Paris and Lexington.

By reason of franchise agreements entered into prior to May 19, 1942, (voided thereafter, see Decree herein of that date) permitting special film rentals not given independents, "Schine" was able to repeat benefits unavailable to independents and these were utilized against independent operators as a means of restraint. These have a definite bearing on the competitive effect of buying power. Rather than make contracts for a single year, as appears to have been Schine's practice prior to 1936, he then began making such for a period of two or three years. These contracts included both the entire circuit and also those theatres for which Schine did the booking. The great buying power of "Schine" enable him to obtain concessions not obtainable by independents. In 1936 Schine made a three year agreement with Fox, and as a result he obtained the Fox feature product in all the towns which "Schine" then operated, and this agreement was later made to include subsequently acquired theatres. In 1938 a subsequent three year agreement was made. These agreements provided for payment of certain percentage of gross receipts after deduction of operating costs, and also fixed minimum admission charges. With Loew in 1936, a four year agreement was made under substantially the same terms as made with Fox. In 1937 a comparable three year agreement was made with Warner; in 1938 a similar one with RKO; a similar two year one with Columbia in the same year and a three year agreement

was made with Universal in 1939. In the instance of United Artists, a distributing corporation, separate contracts were made for each feature for all Schine theatres. Another feature of these agreements was in the inclusion of unfair and inequitable clearance provisions.

Proofs connecting the distributors with certain of the aforesaid acts of defendants come from the provisions of the franchise agreements and acts of the distributors, interdepartment communications of the distributors and statements made by their authorized representatives, of which numerous ones have been set forth herein. It is hardly believable that the executive officers of the distributors did not know some of the methods employed by "Schine" in its efforts to restrict competition. Distributors' salesmen, branch managers and district managers are necessarily in constant touch with "Schine's" operations. By the very terms of the franchise agreements they insured strength against competition. These long term deals were made by each of the distributors, except United Artists whose term deals were necessarily somewhat different, and they were in effect profit sharing agreements and created a virtual partnership with "Schine." To the same end were the unreasonable clearances given "Schine" by each of the distributors. Attention has heretofore been directed to some of these. The plaintiff has submitted in connection with its brief papers purporting to be arbitration awards fixing clearances in certain instances and which arbitrations are purported to have been made pursuant to the Consent Decree entered in the District Court of the United States for the Southern District of New York on November 20, 1940. These arbitration awards are not in evidence. They have no binding effect as res adjudicata or otherwise, and this court has not considered them as evidence. However, it is hardly necessary to look to any other decision to support the view that clearances of 180 or 120 or 90 or 60 days are not reasonable in the instances herein in which they have been allowed. It is true some of these were clearances over third runs but many were over second run. In numerous instances these unreasonable clearances

were allowed over towns in which Schine did not operate, and some towns distant from 10 to upwards of 20 miles, and towns in which there were no theatres. Gloversville got clearance of 45 days over Johnstown, and "Schine" was given clearance both over Newfane and Mohawk where there were no theatres. Many clearances were over outside towns of comparably small population, distant so far that no clearance is justified, such as Randolph, Little Valley and Ellicottville, New York. Many recently were given over towns over which there had been no previous clearance. Metro gave clearance in Ashland over Londenville and Lodi, Ohio; United Artists gave clearance in Auburn over Skaneateles, New York, and Fox in Hornell over Earlville, New York.

The record is replete with inter-department communications between major film representatives which recognize the unreasonableness of the clearances given to Schine at his demand. This is shown by the communications and representations made by Lehman of United Artists, Pielow of M.G.M., Dana and Sauber of Universal, Smith of Warner, and Sussman and Grassgreen of Fox, which are admissible in evidence because these men all held positions in their respective companies so that it was within the scope of their duties to make the representations in the communications that they did as a natural incident of the office, *i.e.*: branch or district manager.

Pielow, MGM resident manager, wrote: "I feel that in some of the situations (unnamed) (discussing Schine contracts), the clearance that he (Lynch) is demanding is unfair * * * .". Dana, branch manager of Universal wrote the district manager that he had asked Louis Schine relative to clearances over the Smalley circuit (Norwich) and that he refused to grant the privilege of serving the pictures with shorter clearance. Universal branch manager Sauber wrote Lynch that they wanted to serve Waterloo in less time than the 30 days clearance after Seneca Falls because other majors were, but Lynch refused though Universal had the

right under its contract to so do. At Rochester Scully, of Universal, said it would be satisfactory if the Madison and Monroe came within the Schine 21 day clearance.

Smith, branch manager of Warner, wrote to the Home office that Canton would do more business if it were not for Schine at Ogdensburg having 30 days clearance and if it was reduced: "If will make a better condition for us all * * * ." Smith also wrote relative to Seneca Falls stating that he hoped Lynch would break down their 60 days clearance: "As I told you this morning over the phone, the clearance set up is all wet * * *."

Sussman, of Fox, wrote to Grassgreen that the 60 day clearance in Glens Falls and elsewhere seemed excessive. Sussman went on to comment that he noted that 60 day clearance was given over second run at Malone when Fox had no second run in Malone, and furthermore, as previously stated, 60 days over second run seemed excessive. Grassgreen replied that while the 60 days at Glens Falls might seem excessive, Lynch insisted upon it. Grassgreen said that Schine insisted upon the 60 day clearance because they wanted to be consistent with their demands for 60 days over subsequent independent runs.

In certain instances the distributors refused to negotiate with the independents for runs not bought by Schine. Such are seen in the refusal of RKO, Fox, Paramount, MGM and Universal to furnish second run at Auburn; of MGM at Amsterdam until the "Schine" deal did not materialize; by United Artists at Geneva; and by RKO, Universal and Fox at Paris.

In many instances the distributors refused to negotiate with the independents for runs. After "The Circuit" came into the town, in many instances it was impossible for the independent to get a good run of major product, or even to have his requests to purchase considered. RKO would not sell to the independent after "The Circuit" came in for 1933-34 in Auburn, 1935-36 in Mt. Vernon; MGM would not sell 1930-31 in Bellefontaine, 1933-34 in Lockport and Nor-

wich, 1935-36 in Van Wert, 1936-37 in Lexington, 1938-39 in Medina; Paramount would not sell 1933-34 in Lockport, 1934-35 in Auburn, 1935-36 in Mt. Vernon; Fox would not sell 1933-34 in Norwich, 1935-36 in Amsterdam and Mt. Vernon; Universal would not sell 1933-34 in Lockport and Norwich; United Artists would not sell 1935-36 in Mt. Vernon and Van Wert; and Warner would not sell 1933-34 in Norwich, 1935-36 in Amsterdam, 1938-39 in Medina and 1941 in Norwich. In these instances, when the independent attempted to make application for product, he was simply advised that the product had been sold to "Schine" in a circuit deal.

Special privileges were granted, as in the option of paying a per cent of the gross receipts from product or flat rental, and as in deducting cost of competitive devices (bank nights, etc.) from gross before computing the distributor's share.

Special license provisions were given by tying up second runs, as in Lockport and Corning.

In certain instances Schine's film contracts called for lower minimum admission charge than those for the independent for subsequent run. This happened in Lexington and Corning.

United Artists with respect to the Capitol theatre in Ilion wrote: "We do not want to encounter any difficulty with the Schine Circuit * * *, we want to be definitely assured that the clearance as submitted in the contracts is satisfactory to the Schine Company."

Sichelman, assistant sales manager for Fox, wrote Schine that Fox was free to sell ten pictures of first run and also 100% second run in Bellefontaine and that the branch manager was being directed to sell these. In reply, Lynch said, in part: "The only product which he (independent) has been able to buy has been from independent companies. There has not been a major company that has sold him any product. * * * We are charging a top of 40¢ admission * * * and we don't want to have the distributing com-

panies make it impossible for us to continue getting this price. * * * I have also written Mr. Schmertz advising him that we will take the remaining pictures which we did not buy first run, and, have also asked him to refrain from selling this second run house." Lynch also wrote to the Fox branch manager asking him to hold off selling the independent.

Further, Lynch wrote United Artists that "Schine" "should be allowed the privilege of playing pictures ahead of a situation (Sodus) charging a lesser admission price." To this the reply, in part, was: "Therefore, in the future, we will grant you fourteen days, or whatever clearance you see fit to take on towns like Elmira etc. in that locality." The Fox home office wrote its branch with reference to Glens Falls, second run: "I note that you have changed the clearances hereby providing for sixty days over third run Glens Falls. Sixty days clearances here and elsewhere seem to be excessive.", and to this the branch manager replied that Schine always provided for this clearance over third run and "George Lynch insisted in carrying it through for the future."

There is much other evidence going to show the influence of "Schine" with the distributors to gain preference over independent competitors and also the cooperation of the distributors with "Schine" to the same end.

Sales managers for each of the major distributors who had authority to approve film leases, called by the defendants, gave testimony, in substance, that to their knowledge there has not been any conversations with any defendants or their executives or employees not to deal with any competing exhibitors to restrict the terms of such dealings. These sales managers can be only a small number of those employed as such during the period in question, and they speak only of their own knowledge. Some six branch and exchange managers have testified as to transactions in contradiction of the plaintiff's proof as to five of the situations in question. In *Interstate Circuit* v. *United States*,

supra, the court said that the failure to call those officers who had authority to act for the distributors and were in a position to know whether they acted in pursuance of an agreement "is itself persuasive that their testimony, if given would have been unfavorable to appellants." While that case was stronger with respect to the proof in this connection, the defense herein as weakened both by the failure to call others of the officers authorized to act and by the nature of the testimony given by these. "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character." *Interstate Circuit* v. *United States*, *supra*.

Proof herein that these defendants conspired is shown by something more than inferences, and this together with the reasonable inferences to be drawn from the direct proof, suffices to show intent to conspire.

It is recognized that the matter of clearances is of major importance in the consideration of the issues herein. One position taken by the defendants is that adequate relief in so far as clearances are concerned may be had under the Consent Decree hereinbefore mentioned in *United States* v. *Paramount Pictures, Inc. et al.* Such Consent Decree was for a trial period of three years from the date of its entry, and it further provided that during such period the petitioner, the United States, would not seek any relief prayed in certain sections of the petition and of the amended and supplemental complaint and in certain other directions. After the expiration of said three year period, the government filed an application for modification of the decree. The defendants therein not admitting the existence of violations to which the application for modification was primarily directed, the suit as originally brought has been continued and has not yet been determined. This seeks the divorcement of theatres from the film producing companies. It is to be noted that Columbia, Universal and United Artists were not parties to the Consent Decree, and

as heretofore noted the other major distributors originally parties defendant in this suit have been dropped as such. The arbitration features have continued to remain in effect since the expiration period by agreement of the parties, and so far as the record discloses there has been no arbitration under this Decree of any clearances involved herein existing at any time. We are called upon in this suit to decide whether there were any violations by these defendants of the law as laid in the complaint. Paramount et al. are not parties here. The violations herein are alleged to have occurred prior to the date of the Consent Decree. There is now no method by which either party can compel arbitration. The action taken in the adoption of the Consent Decree and the present availability of arbitration by agreement, however, do have a bearing on the extent of the judgment or decree to be made herein.

Some of the major companies are exhibitors as well as distributors. The government by the Consent Decree entered in an agreement setting up procedure purported to provide a fair and equitable sale, distribution and showing of pictures to all distributors. Just what was accomplished by the Decree, other than some arbitration of clearances, does not appear. The government in entering into the Consent Decree evidently contemplated that such decree would obviate the necessity of a trial of the issues and intended to let bygones be by-gones. As compared with some of the major distributors, these defendants when combined are relatively small. The Consent Decree, therefore, brings up the question of whether the harsh determination of dissolution as urged by the government should be compelled or whether some adjustment or reorganization can be agreed on or fixed by the court which will as definitely as possible prevent future violations.

The motion picture business in production, distribution and exhibition has come to be a leading industry in this country. The producer-distributors and chains of exhibitors occupy positions from which "monopolization" is easily

brought about. Each have lawful advantages which are sufficiently remunerative. The public, as well as the individual independent exhibitor, has an interest in fair competition, and it is entitled to have exhibitions at reasonable prices, well selected products and reasonable clearances between available theatres. A theatre owner naturally seeks to furnish those pictures which attract the greatest revenue. The record does not disclose any different attitude on the part of "Schine". The record does not disclose that it has not furnished sufficiently attractive entertainment. Fair competition should benefit the public, but "monopolization" when exercised by a strong wide reaching organization or group of affiliated organizations crushes or weakens opposition, eliminates fair competition to the disadvantage of the public and the individual competitor.

The defendants have maintained an unlawful combination among themselves and with their affiliated corporations and have monopolized the licensing of the exhibition of motion picture films in various cities and towns in violation of the aforesaid sections of the Sherman Act and, through the unlawful combination between themselves and their affiliates by their predatory practices, have monopolized the business of operating motion picture theatres in various towns and have attempted to monopolize in various other towns; and the defendants have contracted, conspired and combined with each other and their affiliated corporations and with each of the aforesaid major film corporations for the purpose, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of said film corporations in various towns and cities, in violation of aforesaid statute.

The plaintiff is entitled to a judgment enjoining the defendants:

(1) from monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof, and from monopolizing the supply of second run films in any situation where

there is a suitable theatre for second run exhibitions thereof;

(2) from demanding or receiving clearance over theatres operated by others which unreasonably restrict their ability to compete with a theatre owned or operated by a defendant, or corporation controlled by it;

(3) from conditioning the licensing of films in any competitive situation, outside of Buffalo, New York, upon the licensing of films in any other situation;

(4) from selling or acquiring any theatre interests pending the further order of this Court;

(5) from enforcing any existing agreements heretofore entered into by the defendants not to compete, or to restrict the use of any real estate to non-theatrical purposes; from the use of any threats or deception as a means whereby a competitor is induced to sell;

(6) from continuing the heretofore described "conspiracy" or "monopolization" in restraint of trade and commerce between the states and the entering into any combination or conspiracy for the purpose or with the effect of restraining trade and commerce between the states;

(7) and directing the entering of a decree adjudging that the defendants and their affiliated corporations be dissolved, re-aligned or reorganized in their ownership and control, so that fair competition between them and other theatres be restored and hereafter maintained; and that the determination of the question of the dissolution, re-alignment of reorganization of the parties aforesaid and the method to be employed in the accomplishment of the same be left to be fixed by this court after further consideration with the parties.

As to the objections of the defendants that certain testimony is hearsay, it is to be said this was received in evidence

on the explict statement of the attorneys for the government that the authority to make the statements and write the communications would be shown. The Court reserved the right to strike out in default of making of such connections. This connection has not been made in certain instances, and the court is attaching and submitting herewith a statement of its action with respect thereto. However, it is believed that the exclusion or inclusion of this testimony does not affect the decision on the issues.

In the instant case voluminous records of the distributors were received in evidence on stipulation of the parties. These, among others, included many agreements made by the distributors with the defendants and others. Various interdepartment communications to which objections were made were properly received as a part of the record of the distributors, and further many of them were made by officials acting in their ordinary and usual capacity as representatives of the distributors. Acceptance of this type of evidence is supported by many authorities. *Murray* v. *United States*, 10 F. (2d) 409, cert. denied 271 U. S. 673; *Lewis* v. *United States*, 38 F. (2d) 406; *Johnson* v. *J. H. Yost Lumber Co.*, 117 F. (2d) 53; *Patterson* v. *United States*, 222 F. 599, cert. denied 238 U. S. 635; *United States* v. *Corn Products Refining Co.*, 234 F. 964; *Hartford Empire Co.* v. *United States*, 323 U. S. 386.

The parties herein have heretofore submitted lengthy proposed Findings of Fact and Conclusions of Law. It seems that it would simplify matters if, in the light of this opinion, new Findings were submitted. This seems specially advisable because of the numerous situations involved in the suit. However, this matter will be left to the desires of counsel.

October 8, 1945.

(Sgd.) JOHN KNIGHT,
United States District Judge.

Acting upon the objections made by defendants, the following are stricken from the record:

Testimony by Long (R 127) that Granger, Fox general sales manager, told him that Fox could not afford to give up $50,000 worth of business in order to get $5,000.

Testimony by Dasher (R 352-353) that MGM branch manager Drew told him, "Schine has 60 theatres, you have got one. What do you expect us to do."

Testimony by Cohen (R 3201) that Seed, Warner exchange manager, told him that Schine would pay $25.00 more if Warner did not sell the independent.

Testimony by De Toto (R 808-809) as to what Lehman said Schine was going to do in relation to opening additional theatres.

Testimony by Moore (R 383-384) as to what "Schine" asked that Metro hold (product) for them.

Testimony by Ayres (R 2963-2970) relative to the showing of Metro picture "Gone With The Wind".

Testimony by Warner (R 2350-2355) relative to his being called before the Film Board of Trade by a representative of RKO for a violation of the National Recovery Act in selling "two for one" tickets.

While we have generally held in favor of inter-office communications or memoranda, certain of them are hearsay and are stricken out:

In exhibit 370; "Lynch claims that he does not want a second run policy to prevail at the second run opposition and has promises from other major companies that they will not sell second run" is stricken.

Exhibit 456 refers in part to the fact that the independent told the local branch manager that he might be forced to charge 10¢ balcony and 15¢ main floor at night in order to meet his competition, and that is stricken.

The part of exhibit 519 which refers to the opinion of the branch manager that conditions were "chaotic" is not evidence against "Schine".

Exhibits 163, 229, 542, 546 and 554 are not stricken but are strictly construed. We believe them to be within the authority of the distributor's agent to make such statements, being incident to their scope of authority.

Objection was frequently made to the testimony by the independent that when he requested product of the exhibitor, he was told that it had been sold to "Schine". It is not felt that this is hearsay or beyond the scope of authority of the branch or district manager, or of the salesman. He knew that it was sold, and to whom. The statement that it was sold is admissible, and it is also admissible to state to whom it had been sold.

JOHN KNIGHT,
U.S.D.J.

APPENDIX B

Opinion of John Knight, *U.S.D.J.*
(March 8, 1946)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. SCHINE CHAIN THEATRES, INC., *et al.*, *Defendants.*	Civil No. 223.

Appearances:

ROBERT L. WRIGHT, LOUIS B. SCHWARTZ, *Special Assistants to the Attorney-General;*
WENDELL BERGE, *Assistant Attorney-General;*
GEORGE L. GROBE, *United States Attorney; for Plaintiff.*
EDWARD F. MCCLENNEN, SAMUEL S. ISSEKS, WILLIARD S. MCKAY, *for the Defendants.*

KNIGHT, *District Judge:*

Both parties have moved under Rule 52(b) of the Federal Rules of Civil Procedure to amend the Findings of Fact and Conclusions of Law and the Judgment heretofore filed herein.

The Findings made by the court follow closely the opinion. It is usually the practice of this court to ask the prevailing party to submit Findings. No need has been seen for asking an unsuccessful party to submit Findings. The latter has the opportunity to present the record on appeal.

The amendments proposed by the defendants set out in detail large portions of the testimony. Many of these also contain conclusions contrary to the Findings made.

It is believed that the Findings and Judgment as made are sufficient. It is not the duty of the court to set out the details of the testimony as proposed.

The question has been raised that the relief sought by the defendants is grantable only by motion under Rule 59 and not under Rule 52(b). It is true that the granting of defendants' motion in toto would amount to a reversal of the Judgment. In view of the action herein taken, it seems unnecessary to determine this question. Irrespective, however, of any obligation of the court so to do, certain amendments are allowed.

DEFENDANTS' PROPOSED FINDINGS

Proposed Finding No. 1—Allowed—

> "Among the theatres in which Schine became financially interested there are 25 theatres situated respectively in 16 towns, Auburn, Bath, Canandaigua, Carthage, Corning, Gloversville, Herkimer, Little Falls, Newark, Norwich, Oneonta, Oswego, Salamanca, Saranac Lake, Syracuse and Watertown, New York, which had belonged to Schine before 1930 and had been leased to the Fox-Metropolitan Circuit in 1929, and which reverted to Schine in 1933 as a consequence of the termination of the leases in the Fox-Metropolitan bankruptcy proceedings. The result of this reversion was that it was necessary for Schine to resume the operation of the said theatres. At the end of the year 1930 Schine had no motion picture theatres, except suburban theatres in Buffalo and Rochester, motion picture theatres in Cortland, East Rochester, Fairport, Rockport, Geneva, Malone, Medina and Ogdensburg, and a half interest in Amsterdam and a theatre under construction in Bellefontaine, Ohio."

and to be added to Finding No. 3 as found and not substituted therefor. The remainder of the proposed Finding is disallowed.

Proposed Finding No. 2—Allowed—

> "Schine has expended for the cost of land and buildings acquired by it the sum of $6,509,100.00 and for the cost of building additions and improvements the sum of $4,439,000.00."

and to be added to Finding No. 4 as found and not substituted therefor. The remainder of the proposed Finding is disallowed.

Proposed Finding No. 3—Disallowed.

Proposed Finding No. 4—Disallowed.

Proposed Finding No. 5—Allowed—

> "Schine acquired by purchase or lease 55 theatres from 1922 to 1931 and 80 from 1936 to 1941, inclusive, 15 in 1938 and 15 in 1939. The 55 theatres included the 25 which, as above stated, had been acquired by Schine and sold or leased to Fox-Metropolitan and which reverted to Schine in 1933 in the Fox-Metropolitan bankruptcy proceedings."

and to be added to Finding No. 7 as found. The remainder of the proposed Finding is disallowed.

Proposed Finding No. 6 to No. 14, inclusive,—Disallowed.

Proposed Finding No. 15—Allowed and to be added to Finding of Fact No. 20, but not in substitution therefor.

Proposed Finding No. 16—Allowed and to be added to Finding of Fact No. 21, and not to be substituted therefor.

Proposed Finding No. 17—Disallowed.

Proposed Finding No. 18—Disallowed.

Proposed Finding No. 19—Disallowed.

Proposed Finding No. 20—Allowed.

Proposed Finding No. 21 to No. 26, inclusive,—Disallowed.

Proposed Finding No. 27 to No. 31, inclusive,—Disallowed.

Proposed Finding No. 32—Allowed, except that the record shows approximately 87% are located in cities and villages.

Proposed Finding No. 33 to 44, inclusive,—Disallowed.

Proposed Finding No. 45—Allowed, except that "or 40" percent should be stricken.

Proposed Finding No. 46 to No. 84, inclusive,—Disallowed.

CONCLUSIONS OF LAW

V-1-9, inclusive, Denied.

VI—Denied.

VII—Denied.

PLAINTIFF'S PROPOSED FINDINGS.

1. Add at the end of Finding No. 22 the following: "Minimum admission prices were omitted from Schine's contracts, although the contracts of his independent competitors specified minimum admission prices.

"The Plaza contracts in evidence prohibited it from charging less than 15 cents. The Fox contracts for the 1933-34 season permitted Schine's State Theatre with a 60-day clearance over the Plaza, to charge an adult evening orchestra admission price five cents lower than the Plaza was required to charge. Metro's 1933-34 contract for Schine's State Theatre omitted any minimum admission price requirement, as did the Universal contract for the State and RKO contracts for the Fox and State Theatres in both the 1933-34 and 1934-35 contracts.

"In Lexington, Kentucky, Schine's contract with Fox for the 1936-37 first run product provided for minimum admission prices in Schine's Lexington Theatre for the first run showing of Fox pictures. Schine cut its admission price below the minimum prices fixed. Schwartz complained to Fox and Paramount about these. Fox advised Schine of this complaint and Myer Schine replied that the cuts were 'quite essential and proved to be beneficial.' Fox then omitted all minimum admission price requirements in the Schine second and third run contracts for the succeeding seasons, but provided for minimum evening adult admission prices of 15 cents for the independent theatre."

In other respects the proposed finding is disallowed.

2. Disallowed.

Nos. 3 to 7, inclusive, Allowed. It seems to me that the proposed amendments are reasonably based on the opinion herein.

8. It is believed that the court should not at this time include any Finding with respect to authorizing representatives of the Department of Justice to have access to books, etc. of a defendant corporation and to interview officers of a defendant corporation. It is believed that the court has the authority to make this direction. (*United States v. Bausch & Lomb*, 321 U. S. 707.) A plan of reorganization of the defendants or re-alignment of the theatres in suit has been submitted by the plaintiff and action on it is pending. We see no reason why the matter proposed in No. 8, *supra*, should not await consideration of the plan or some further action relative to the judgment.

March 8, 1946.

JOHN KNIGHT,
United States District Judge.

APPENDIX C

Opinion of John Knight, *U.S.D.J.*

(July 5, 1946)

United States District Court

Western District of New York

United States of America, *Plaintiff*, v. Schine Chain Theatres, Inc., *et al.*, *Defendants.*	Civil No. 223

Appearances:

Robert L. Wright,

Louis B. Schwartz, *Special Assistants to the Attorney-General;*

Wendell Berge, *Assistant Attorney-General;*

George L. Grobe, *United States Attorney; for plaintiff,*

Willard S. McKay, *of New York City, for Defendants;*

Arthur Garfield Hays, *of Counsel.*

Knight, *District Judge:*

The Decision of this court in this suit directs "the entering of a decree adjudging that the defendants and their affiliated corporations be dissolved, re-aligned or reorganized in their ownership and control, so that fair competition between them and other theatres be restored and maintained; and that the determination of the question of the dissolution, re-alignment or reorganization of the parties aforesaid and the method to be employed in the accomplishment of the same

be left to be fixed by this court after further consideration with the parties."

Pursuant to the foregoing direction, the court, together with the parties, has had under consideration the adoption of several different plans. The general features of the plan submitted by the plaintiff have been adopted. The principal difference is that the plan as approved does not include the divestiture of the interests of the defendants in numerous towns where the defendants now own or control the only theatre.

The plan as approved directs these things:

1. That the defendants' interests in theatres located in certain towns, except in one theatre selected by them be sold.

2. That defendants' interests in theatres located in certain towns, except in two theatres selected by them, be sold.

3. That the defendants' interests in the Riviera or Liberty and in the Monroe or Madison theatres in Rochester, N. Y., be sold.

4. That the existing pooling arrangements be made in the manner and at the time directed.

5. That the theatre interests of the defendants remaining and undisposed of under the consent order of May, 1942, be sold.

6. That a trustee as an agent of the court be appointed to make the aforesaid sales; that no defendant shall acquire any financial interest in additional theatres except after affirmatively showing that such acquisition will not unreasonably restrain competition; and that no defendant shall buy or book films for any theatre other than those in which the defendant owns a financial interest.

The decree herein also provides that its provisions may be stayed pending a final determination of any appeal. This is conditioned upon the diligent prosecution by the defendants of such appeal, so that the ultimate enforcement of this order may not be prejudiced.

The defendants submitted three so-called "Proposed Re-alignment" plans. No one of these is acceptable. The so-called proposed Re-alignment plan No. IV has been specially urged on the court. This plan contemplates the division of Schine Chain Theatres, Inc., and its subsidiaries, into three separate corporations, in one of which J. Myer Schine would own all of the stock of the New York theatres, in another of which Louis W. Schine would own all of the stock of the Ohio theatres, and the third of which Mrs. J. Myer Schine and Mrs. Louis W. Schine would own all of the stock of the Delaware, Maryland and Kentucky theatres. It proposes that J. Myer Schine own or lease and manage, buy and book for all New York theatres; Louis W. Schine own or lease and manage and buy and book for all Ohio theatres; and Mrs. J. Myer Schine and Mrs. Louis W. Schine to own or lease and manage and buy and book for all theatres in Delaware, Maryland and Kentucky. This plan does not include the divestiture of ownership in any theatre, other than would be caused by the organization of the three corporations and by the holding of the stock interests as aforesaid. The fatal objection to this plan, aside from the question of divestiture, as it appears to me, is that as a practical matter the type of violations of the law found in this suit and condemned by this court could readily be pursued by a continuation of the three interests. The entire present interests in all this great chain of theatres would be continued in the two Schines, brothers, and their wives. Were this plan proposed with the inclusion of divestiture of the theatres of which the defendants are directed to be divested, it would justify favorable consideration. But the plan adopted by the court is more favorable to the defendants herein than such a division of the corporation together with such divestitures would be. The plan adopted by the court is not a re-alignment in the sense intended in the Decision. The direction was in the alternative. It is now made to appear that a re-alignment is not feasible.

The purpose of this and like suits by the government, under its announced policy, is not for the purpose of penalizing defendants but rather the "Restoration of free enterprise and open competition amongst all branches of the motion picture industry." In order to effectuate this policy the divestiture of theatres, as hereinbefore stated, is deemed necessary.

July 5, 1946.

JOHN KNIGHT,
United States District Judge

APPENDIX D

IN THE

District Court of the United States

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* v. SCHINE CHAIN THEATRES, INC., *et al.*, *Defendants.*	Civil No. 223

ORDER OF JULY 5, 1946

Upon consideration of the plans heretofore filed herein by the plaintiff and the defendants for the purpose of effectuating Section III of the amended judgment heretofore entered herein, the objections filed to said plans by the said parties, and the argument of counsel with respect thereto, it is hereby

ORDERED, that the following plan should be and it is adopted for said purpose:

I

THEATRE INTERESTS TO BE DIVESTED

A. All of the defendant's interests in theatres located in the following towns, except in one theatre to be selected by them, shall be sold in the manner hereinafter outlined:

Amsterdam, New York
Ashland, Ohio
Athens, Ohio
Bellfontaine, Ohio
Bucyrus, Ohio
Cambridge, Maryland
Canandaigua, New York
Corning, New York
Cortland, New York
Delaware, Ohio
Easton, Maryland
Geneva, New York
Herkemer, New York
Ilion, New York
Kent, Ohio
Little Falls, New York
Lockport, New York
Malone, New York
Maysville, Kentucky
Middlesboro, Kentucky
Newark, New York
Norwalk, Ohio
Ogdensburg, New York
Oneonta, New York
Paris, Kentucky
Piqua, Ohio
Ravenna, Ohio
Richmond, Kentucky
Salamanca, New York
Seneca Falls, New York
Tiffin, Ohio
Watertown, New York
VanWert, Ohio

B. All of the defendants' interest in theatres located in the following towns, except in two theatres to be selected by them, shall be sold in the manner hereinafter outlined:

Auburn, New York
Lexington, Kentucky
Oswego, New York
Wooster, Ohio

C. In Rochester, New York, the defendants shall sell all of their interest in the Riviera or Liberty Theatres and in the Monroe or Madison Theatres in the manner hereinafter outlined.

The names of the theatres which the defendants elect to retain in the towns named in paragraphs A, B, and C above shall be filed with the court within 30 days after the defendants shall have received a copy of this order.

D. The existing pooling arrangements at Fostoria and Medina, Ohio; and Syracuse, New York, shall be dissolved. Such dissolution in Syracuse may be effected pursuant to the decision rendered in *United States* v. *Paramount Pictures, Inc., et al.* on June 11, 1946, and consideration of such further orders as may be appropriate in this suit in this connection is reserved until after final judgment shall have been entered in that case. Such dissolution in Fostoria and Medina may be effected either by dissolution of the respective corporations through which the defendants' theatre interests in these towns are jointly held with non-defendants and return of the theatres involved to the respective stockholders who owned them prior to the formation of the corporation or by a sale of the defendants' stock in such corporations. In the event that said corporations have not been dissolved as outlined above within one year from the entry of this order, the defendants' stock therein shall be sold in the manner hereinafter outlined.

E. The following theatre interests remaining undisposed of under the consent order of May 10, 1942, and more particularly described therein, shall also be sold in the manner hereinafter outlined:

Strand Theatre—Cumberland, Maryland
Ada Meade and Opera House Theatres—Lexington, Ky.
½ interest in the Margie Grand Theatre—Harlan, Ky.

II

METHOD OF SALE

The theatre interests described in Section I hereof shall be sold as rapidly as possible upon such terms and to such purchasers as this court may approve, to the end that the theatres disposed of may operate in competition with theatres retained by the defendants. A trustee is to be appointed herein as the agent of the court for making such sales and is hereinafter designated as the trustee. Within thirty (30) days from the entry of this order the parties hereto may designate the name of a person to be appointed as trustee. In the event of their failure to agree upon the person to be so designated, the court will appoint a trustee. The trustee is hereby authorized:

(1) to examine such books and records of the defendants and make such inquiries of their employees as may be necessary to ascertain the value of the theatre interests in question;

(2) to take such action and to employ such assistance as may be necessary to negotiate and close sales of such interests, including real estate brokers, accountants, and legal counsel.

The defendants shall at all times provide the trustee with free access to the theatres to be sold, for the purpose of showing them to prospective purchasers and shall cooperate with the trustee to facilitate said sales, while continuing to maintain and operate said theatres in the ordinary and usual manner. The trustee shall present sales to the court for approval as they are negotiated and shall give reasonable notice to the defendants and the plaintiff of the terms and purchasers involved in such sales as he desires to submit for approval, to the end that they may have a fair opportunity to bring to the attention of the trustee and the court such objections as they deem appropriate.

The sales provided in Section I-E above shall be completed within six months and the remaining sales shall be completed within two years from the entry of this order, subject to such extensions with respect to specific interests as the court may grant, for good cause shown, upon the petition of the trustee or any party.

The trustee shall be compensated and his expenses paid, in such amounts as the court may from time to time approve, from the proceeds of sales made by him. Said proceeds shall be deposited by him in a special account created for this purpose and disbursed only upon further orders of this court.

III

RESTRICTIONS ON FUTURE THEATRE ACQUISITIONS

No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition. Such showing shall be made before this court upon reasonable notice to the Attorney General at Washington, D. C. No defendant shall buy or book films for any theatre other than those in which the defendant owns a financial interest.

IV

STAY

The provisions of this order may be stayed pending a final determination of any appeal taken therefrom. Such stay shall be conditioned upon the diligent prosecution by the defendants of such appeal as may be allowed them and the maintenance and operation by them of the theatres here involved, pending such appeal, in a manner which will not prejudice the ultimate enforcement of this order.

Entered this 2d day of July, 1946.*

/s/ JOHN KNIGHT
United States District Judge

*Actually entered July 5, 1946.